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Supreme Court of the United States

October Term, 1974
No. 74-531

THOMAS F. PATTON and RALPH S. TYLER, JR.,
TRUSTEES OF THE ERIE LACKAWANNA
RAILWAY COMPANY, DEBTOR,
Petitioners,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND CONGRESS OF RAILWAY UNIONS,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

(Decided and Filed July 5, 1974)

No. 73-1713

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,
Plaintiffs-Appellants,

VS.

THOMAS F. PATTON AND RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Ohio,
Eastern Division.

Before: PHILLIPS, *Chief Judge,* EDWARDS and PECK, *Circuit Judges.*

EDWARDS, *Circuit Judge.* This is an appeal by various of the railway labor unions from an ex parte order, subsequently reaffirmed after hearing, entered by a District Judge in the United States District Court for the Northern District of Ohio, Eastern Division, acting as a Reorganization Court. This order provided for the suspension of

previously negotiated employee protection agreements and the impoundment of funds which would have otherwise been paid to the employees.

This action was taken on petition of the Trustees of the debtor (Erie Lackawanna Railway). The Trustees had previously filed for reconsideration and suspension of these agreements before the Interstate Commerce Commission. Since the District Court's action, the ICC has now heard and decided this petition, finding that "The record in this proceeding fails to provide a basis upon which the Trustees' petition may be granted." ..... I.C.C. ....., Finance Docket No. 21510 (decided April 29, 1974). This decision undercuts the basis upon which the District Court order was entered.

A brief history of this matter indicates that on June 9, 1967, the Erie Lackawanna Railway Company was authorized to be included in the Norfolk and Western Railway Company System by an order issued by the ICC. Subsequently, the Erie Lackawanna Railway Company (debtor) and the bargaining representatives of its employees entered into protection agreements on August 19 and August 29, 1968, which required the debtor to guarantee that none of its employees would be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during their employment. The unions argue that these agreements were *quid pro quo* for certain changes of operating conditions as a result of the merger with the Norfolk and Western which would have the effect of more economical operation with less manpower for the Erie Lackawanna.

Subsequently, on June 26, 1972, the debtor filed a reorganization petition under § 77 of the Bankruptcy Act,

11 U.S.C. § 205 (1970), and on March 20, 1973, the Trustees of the debtor filed a petition for reconsideration of the employee protection agreements before the ICC and the petition before the District Court for the suspension of wage payments required by those agreements.

At oral argument of this appeal the Trustees claimed that their petition before the District Court was designed to preserve the status quo pending determination by the ICC of the petition to reconsider and suspend the protection agreements. Now, however, the Trustees assert their intention to seek reconsideration of the adverse decision of April 29, 1974, of the ICC and seek delay of this court's action on this appeal.

Section 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n) (1970), says in part:

> "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in §§ 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended."

Clearly, the prescribed procedure was not followed in this case.

Further, the District Judge took no testimony on the question of irreparable harm either from the railroad trustees, who proffered none, or from the labor unions, which did. We do not believe that the District Court could properly wield its equitable powers (assuming they were not restricted by § 77 (n)) without having heard testimony on such problems bearing on equity as what represented the status quo and what the effect of suspension of the agreements would be. In two recent cases this court has reversed orders entered under the court's equitable powers

for failure to take evidence and make findings of fact on irreparable injury. *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union,* 471 F.2d 872 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); *North American Coal Corp. v. Local 2262, UMW,* ..... F.2d ..... (6th Cir. 1974) (Decided May 10, 1974).

> "The fatal defects in the decision of the District Court were: (1) its failure to weigh the equities between the parties and to determine whether the employer would suffer more from the granting of the injunction than the Union from its denial, as required by Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 254, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970); and (2) the absence of a showing of irreparable harm to employees as mandated by *Boys Markets." Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union, supra* at 875.

Note a similar holding in *North American Coal, supra,* where the parties were reversed.

The judgment of the District Court is reversed and Orders No. 71 and 101 of the Reorganization Court are vacated.

JUDGMENT OF THE SIXTH CIRCUIT COURT OF APPEALS

(July 5, 1974)

No. 73-1713

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,
Plaintiffs-Appellants,

VS.

THOMAS F. PATTON AND RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,
Defendants-Appellees.

BEFORE: PHILLIPS, *Chief Judge*, EDWARDS and PECK, *Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and Orders Nos. 71 and 101 of the Reorganization Court are vacated.

It is further ordered that Appellants recover from Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ John P. Hehman
Clerk

ORDER OF COURT OF APPEALS ON REHEARING

(August 8, 1974)

No. 73-1713

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND CONGRESS OF RAILWAY UNIONS,
Plaintiffs-Appellants,

vs.

THOMAS F. PATTON AND RALPH S. TYLER, JR., TRUSTEES OF THE ERIE LACKAWANNA RAILWAY COMPANY, DEBTOR,
Defendants-Appellees.

Before: PHILLIPS, *Chief Judge*, EDWARDS and PECK, *Circuit Judges.*

On receipt and consideration of a suggestion for rehearing in banc; and

No judge of this court having moved for such rehearing and the motion for rehearing having been assigned to the panel which decided the case; and

Noting nothing which had not been previously considered,

Said motion for rehearing is hereby denied.

Entered by order of the Court

/s/ John P. Hehman
Clerk

ORDER NO. 71 OF THE DISTRICT COURT

(March 21, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings for the Reorganization
of a Railroad
No. B72-2838

In the Matter of
ERIE LACKAWANNA RAILWAY COMPANY, Debtor

ORDER NO. 71

Upon consideration of the Petition of Trustees Concerning Suspension of Employee Protection Agreement, it is ORDERED:

(1) Upon good cause shown and upon finding that irreparable harm will result to the Debtor's estate unless this Order is entered, the Trustees are hereby directed to suspend the payments provided by the Protection Agreement and related agreements until further order of this Court.

(2) Upon suspension of the payments provided by the Protection Agreement and any related agreements pursuant to this Order, the Trustees are directed to deposit such payments in a special account drawing interest at the maximum available rate at Society National Bank, Cleveland, Ohio, subject to the further orders of this Court.

(3) The Trustees are directed to give notice to Intervenors and other parties in interest of the entry of this

Order, and unless motion to vacate or other pleading is filed by April 2, 1973, this Order shall become final.

(4) This Court reserves further right and jurisdiction over the monies deposited in such special account, and the income derived therefrom, and the right and jurisdiction to make such further orders as this Court shall deem proper concerning the subject matter of this Order.

/s/ Robert B. Krupansky
United States District Judge

MEMORANDUM, OPINION AND ORDER NO. 101 OF THE DISTRICT COURT

(May 17, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In Proceedings for the Reorganization
of a Railroad
No. B72-2838

In the Matter of
ERIE LACKAWANNA RAILWAY COMPANY, Debtor

MEMORANDUM, OPINION AND ORDER NO. 101
RELATING TO HEARING ON MOTIONS
TO VACATE ORDER NO. 71

On June 26, 1972, the Erie Lackawanna Railway Company ("Debtor") filed a Petition for Reorganization with this Court pursuant to §77 of the Bankruptcy Act, 11 U.S.C. §205. This action was precipitated by the Debtor's inability to meet its financial commitments as they became due, attributable in part to the great damage to the Debtor's property and operations inflicted by the "Agnes" floods of late June, 1972.

Approval of the Debtor's Petition vested exclusive jurisdiction over the Debtor's property, wherever situated, in this Court. 11 U.S.C. §205(a); *New Haven Inclusion Cases*, 399 U.S. 392, 420 (1970). Thomas F. Patton and Ralph S. Tyler, Jr., were subsequently appointed Trustees

of the Debtor's property to operate the Debtor's business and to conduct its affairs, subject to the Court's control during the reorganization. 11 U.S.C. §205(c).

On March 20, 1973, the Trustees petitioned the Interstate Commerce Commission (the "Commission") to reopen the proceedings which authorized the merger of the Erie Lackawanna Railway Company into the Norfolk and Western Railway Company's system ("N&W") effective April 1, 1968. The Trustees' Petition requests the Commission's authorization to suspend, during the pendency of the reorganization proceedings, the Agreement for Protection of Employees of Erie-Lackawanna Railroad Company Following Merger of Said Company Into Erie Lackawanna Railway Company (the "Protection Agreement"), and related agreements, which became effective on the merger date.

The Trustees contend that the pre-reorganization Protection Agreement was impressed upon the Erie Lackawanna Railway Company by order of the Commission as a prerequisite to merger into the N&W system to insure the Debtor's employees against possible adverse effect of the merger. They further contend that due to termination of N&W control by the reorganization proceedings, the Protection Agreement is unwarranted.

> . . . the Commission's inclusion order was founded upon the premise that the employees of Erie-Lackawanna Railroad Company would be adversely affected as the result of the vesting of ownership and control of Erie Lackawanna in the N&W system; that the payments provided for in the Protection Agreement and related agreements were based upon the implied condition of the establishment and continuation of such control and ownership; and that, upon the appointment and qualification of the Trustees in the reorganization proceedings

before this Court, the Trustees became seized of the ownership and control of the Debtor's property, thereby terminating N&W's ownership and control of the Debtor's property. Thus, it is the Trustees' position before the Commission that since the underlying conditions of control and ownership by N&W have ceased to exist and will continue to be nonexistent during the course of these reorganization proceedings, there is correspondingly no basis upon which to continue the operation of the Protection Agreement and related agreements during such proceedings. Memorandum of Trustees in Support of Order No. 71, at 5, 6.

The applicable portion of the Commission's order referred to is as follows:

We believe that petitioners' employees should be protected in the same manner as counterpart employees of carriers included in the N&W system by the prior report. Accordingly, the attrition protection here will be restricted to employees who are represented by unions signatory to the attrition agreement and the modification referred to herein and such protection will be applied in the manner hereinafter stated. The attrition protection can be accomplished by further amendment to the agreement, as modified, in which the parties (N&W system carrier, EL, D&H, R&M and RELA) will include therein petitioners' employees who are members of the unions signatory to the original agreement, as modified. As an alternative, the parties may enter into a new agreement, incorporating therein substantially the same terms and conditions as were contained in the original attrition agreement, as modified, together with such changes therein as they deem appropriate. Since the instant proceeding is a continuation of the original N&Y-Nickel Plate unification pro-

ceedings, we believe this method will virtually assure the same treatment for petitioners' employees as is now accorded to their counterparts in the present N&W system. While we have the power to prescribe the necessary conditions, it appears preferable to leave the matter to the parties initially and to require them to submit evidence of agreement with respect to attrition protection within a period of 60 days from the effective date of our order herein. Any agreement, of course, should refer to employee benefits and to obligations under the prior agreement. Failing evidence of agreement within that period, we will prescribe appropriate conditions. Respondent's Exhibit B at 824, 825.

Immediately following the filing of their Petition with the Interstate Commerce Commission, the Trustees petitioned the Court for authority to suspend payments to employees required pursuant to the terms of the Protection Agreement. On March 21, 1973, the Court issued Order No. 71, granting the temporary relief requested, and ordered the accrued funds deposited into a special interest drawing account at Society National Bank, Cleveland, Ohio, under the exclusive jurisdiction and control of the Court, pending a determination by the Interstate Commerce Commission on the issues raised by the Trustees' Petition. The Order further provided for notice to all intervenors and other parties in interest of its entry, and fixed April 2, 1973, as the cut-off date for pleadings in opposition thereto. Motions to Vacate were filed by the following union representatives: The Congress of Railway Unions, the Railway Labor Executives' Association, and the Brotherhood of Locomotive Engineers (the "Unions"). A full and complete hearing on the Motions was accorded interested parties on April 16, 1973.

The Unions, both in their pleadings and oral arguments before the Court, contend that:

1. The Court lacked jurisdiction to enter an order in the nature of Order No. 71, and the Interstate Commerce Commission lacks jurisdiction to modify its previous order;

2. Order No. 71 contravenes §77(n) of the Bankruptcy Act, 11 U.S.C. §205(n), §5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f), and the Railway Labor Act, 45 U.S.C. §151, et seq.;

3. In the event that jurisdiction attaches to the subject matter of the proceeding, the Court should stay its hand pending a determination by the Interstate Commerce Commission of the Trustees' Petition for Reconsideration, or alternatively, order the Trustees to resume payments pursuant to the Protection Agreement.

I. Jurisdiction

The Supreme Court has recognized the broad and general equitable jurisdiction and authority inherent in reorganization courts to accomplish the fundamental objectives of railroad reorganization to:

1. Conserve the Debtor's estate for the benefit of its creditors; and

2. Preserve an on-going railroad in the public interest. *See, New Haven Inclusion Cases, supra*, at 420, 421, 431.

Acknowledging that the reorganization Court has exclusive jurisdiction over the Debtor's property pursuant to §77(a) of the Bankruptcy Act, 11 U.S.C. §205(a), and the duty to protect that property in its efforts to accomp-

lish the aforementioned objectives of railroad reorganization, the Supreme Court has upheld the right of a reorganization court to impound funds in the constructive possession of the Debtor where the right to such funds is in dispute, pending a determination by the proper tribunal as to which party should prevail. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

Recognizing the exceptionally broad statutory authority delegated to the Interstate Commerce Commission by Congress to modify and amend its original determinations when the circumstances so warrant, this Court assiduously avoids any act which could be even remotely construed as interfering with such areas of original administrative jurisdiction. 49 U.S.C. §17(6),(7); *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970).

It is equally apparent, however, from the pronouncements of the Supreme Court that this Court must exercise its inherent authority pursuant to the Congressional mandate to conserve the Debtor's estate, and preserve an ongoing enterprise in the public interest. This Court concludes that implementing the mandate of Congress dictates the impounding of the funds here in dispute pending the Commission's exercise of jurisdiction to resolve the issues presented by the Trustees' Petition.

II. Statutes

The Court further concludes that the Unions' contention that the language of §77(n) of the Bankruptcy Act, 11 U.S.C. §205(n), prohibits the Court's entry of Order No. 71 is without merit. The pertinent language of that section is clear and unambiguous, and does not apply to protection agreements authorized by the Interstate Commerce Commission.

> No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in §§151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended.

As the Sixth Circuit explained in *Norfolk and Western v. Nemitz*, 436 F. 2d 841, 845, aff'd 404 U.S. 37 (1971), the Interstate Commerce Act confers exclusive jurisdiction upon the Commission to adjust the work and compensation of employees affected by mergers or inclusions, and the provisions of the Railway Labor Act do not apply to the orders of the Commission relating thereto.

The Court finds that Order No. 71 does not change the wages or working conditions of employees as prohibited by §77(n), 11 U.S.C. §205(n). The Court further finds that the section does not restrict the Court in its exercise of its power to provide equitable interim relief to preserve the status quo pending a disposition of the matters before the Interstate Commerce Commission, which are not controlled by the provisions of the Railway Labor Act.

III. Irreparable Harm

Order No. 71 was designed to protect the interests of both the employees and the Trustees by preserving the subject matter in dispute until the Interstate Commerce Commission resolves the issues presented by the Petition of the Trustees, thereby assuring the integrity of the accrued funds, including interest thereon, and allaying even the threat of irreparable harm to either side.

Order No. 71 has preserved the status quo by preventing either party from dissipating the assets pending a final determination of the issues before the Commission. Also, Order No. 71 eliminates the necessity of further costly

litigation by the prevailing party to receive the fruits of its successful efforts.

Denying interim relief would breach the Court's duty to the creditors of the Debtor, and the general public by allowing the Debtor's estate to be depleted before the proper tribunal determined the status of the disputed funds. *Thompson v. Magnolia Petroleum Co., supra.*

Having applied the well established doctrine of "balancing the equities" to the matters before it, the Court finds that the interim relief provided by Order No. 71 is fair and equitable to all concerned. Any inconvenience to either party can be remedied by expeditious action by the Interstate Commerce Commission.

Accordingly, the Motions of the Congress of Railway Unions, the Brotherhood of Locomotive Engineers, and the Railway Labor Executives' Association to Vacate Order No. 71 are denied.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

SUPPLEMENTAL REPORT AND ORDER OF THE INTERSTATE COMMERCE COMMISSION

(Decided April 29, 1974)

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21510

NORFOLK AND WESTERN RAILWAY COMPANY AND NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY—MERGER, ETC.

Upon further consideration, the petition of the Erie Lackawanna Trustees to reopen for further hearing, reconsideration, and suspension of employee protection agreement, denied.

SUPPLEMENTAL REPORT OF THE COMMISSION ON FURTHER CONSIDERATION BY THE COMMISSION:

By report and order of June 24, 1964, 324 I.C.C. 1, this Commission approved, among other things, the merger of the properties and franchises of the New York, Chicago and St. Louis Railroad Company, into the Norfolk and Western Railway Company, subject, among other things, to the imposition of labor protective conditions, the right of various railroads including the Erie Lackawanna Railroad Company (E-L) to seek inclusion at any time within five years, and a retention of jurisdiction for five years to receive inclusion petitions. By supplemental order of June 9, 1967, 330 I.C.C. 780, as modified by orders of August 10, 1967, and September 1, 1967, 331 I.C.C. 22, and by the order of March 14, 1968 (not printed), E-L's petition for inclusion in the N&W System was authorized and directed. The Commis-

sion, in authorizing the E-L inclusion,[1] provided that petitioners' employees be protected in the same manner as counterpart employees of the carriers included in the N&W System by the report in 324 I.C.C. 1, and directed the parties to execute and submit their own protective agreement. The inclusion was consummated on April 1, 1968, and the parties submitted a protective agreement, executed August 19, 1968, and effective as of the consummation date, which incorporated by reference the provision of the original N&W agreement that no railroad employee would be placed in any worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto at any time during their employment after inclusion. On June 26, 1972, a petition for reorganization was filed by E-L under section 77 of the Bankruptcy Act, and the reorganization court took jurisdiction over the debtor shortly thereafter. Acting on a request of the Trustees, the court suspended payments due under the protective agreement and ordered that such funds be deposited into escrow.

On March 20, 1973, the Trustees of the E-L filed a petition seeking a reopening of the inclusion proceedings for the purpose of further hearing, reconsideration, and suspension of the operations of the employee protective agreement during the course of the reorganization proceedings. By order of the Commission, dated June 8, 1973, the proceeding was reopened for the limited purpose of oral argument on the issues, and all parties appeared before the entire Commission.

The Trustees contend that the protective agreement is premised on the theory that the employees of E-L could be adversely affected by the line's inclusion in the N&W

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1. 330 I.C.C. 780, 826.

System since it was contemplated that employees could be transferred throughout the N&W System. They further contend that a termination of the N&W control resulting from the pending reorganization proceeding and the elimination of the benefits accruing as contemplated by inclusion, eliminates any basis upon which to continue the benefits provided under the protective agreement and related implementing agreements.

In reply, the Railway Labor Executives' Association (RLEA) urges the dismissal of the petition, alleging the Commission lacks authority to suspend provisions of an employee protective agreement imposed pursuant to section 5(2)(f) of the Interstate Commerce Act. It contends that since the agreement was negotiated by the parties under the provisions of the Railway Labor Act, the agreement and the wages, rules, and working conditions it governs may not be changed except in accordance with the procedures prescribed by that Act. RLEA cites *Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37 (1971) for the proposition that parties to a labor protective agreement negotiated pursuant to the provisions of the Railway Labor Act may not, by subsequent implementing agreement, substantially reduce the benefits provided by the agreement, which had been imposed by the Commission as a condition of its approval of a merger. Thus, if the principals to such a protective agreement cannot abrogate the rights of employees by mutual agreement, the RLEA reasons that the Commission cannot do so unilaterally at the request of only one of the parties signatory thereto. Further, since it has filed a motion to vacate the reorganization court's order to suspend payments. RLEA prays that the Commission postpone action on the Trustees' petition pending disposition of the same issue by the reorganization court so as to avoid protracted and unnecessary litigation.

The Congress of Railway Unions (CRU) filed a reply requesting that the Commission defer consideration of the Trustees' petition pending disposition by the reorganization court of the motions to vacate its order suspending the payments. CRU urges denial of the petition for numerous reasons: the agreements are collective bargaining agreements which can only be modified in the manner prescribed therein or in the Railway Labor Act; a suspension would effect a substantial change in wages or working conditions of employees in violation of Sections 2, Seventh and Section 6 of the Railway Labor Act, Section 77(n) of the Bankruptcy Act, and the "standard of compensation" for employees by virtue of contracts and conditions imposed by the Commission; the Trustees do not claim that debtor cannot afford the payments required by the collective bargaining agreement; and there is no indication that the estate of the debtor would suffer any hardship from carrying out the contract while a suspension of the payments would cause irreparable injury to the employees of the debtor.

The Trustees filed a response to the labor replies, in which they contend that the statutory law, sections 5(9), 5(11), and 16(6) of the Act, and pertinent case law clearly establish the Commission's continuing and exclusive jurisdiction to reconsider any aspect of a section 5(2) order to reflect changed circumstances and to issue whatever subsequent orders as may be necessary and appropriate. Further, they assert that the Commission specifically retained jurisdiction in its supplemental order of June 9, 1967. The Trustees reject the labor arguments that suspension of payments would violate the Railway Labor Act, Section 77(n) of the Bankruptcy Act, and the Supreme Court's decision in *Nemitz*. First, the Trustees contend that Section 5(11) of the Act pre-empts the application of the Railway Labor Act be-

cause parties entering into a section 5(2) merger transaction are relieved from the operation of all Federal legal restraints, including the Railway Labor Act. Second, they urge that the Bankruptcy Act is not applicable here, inasmuch as that legislation prohibits a judge or trustee, but not the Commission, from changing wages or work rules, except as prescribed in the Railway Labor Act. Finally, the Trustees urge that the Commission should not defer exercising its jurisdiction inasmuch as the issues before the reorganization court and the Commission are different.

On oral argument, the Trustees sought to justify suspension of payments on the theory that the protective agreement was void for failure of consideration. The Trustees viewed the agreement as a continuing bilateral contract, with E-L having the right to transfer its employees throughout the entire N&W System and adversely affected employees having the right to receive compensatory protection payments. It was contended that the filing of the petition in reorganization and commencement of reorganization proceedings constitute a changed circumstance terminating N&W's control of E-L and E-L's right to transfer employees within the N&W System. The Trustees emphasized that the E-L has paid $3,730,000, to date under the contract, but have made only two groups of employee transfers, at Binghamton, N.Y., and Hammond, Ind., to Chicago, Ill. Since the change has destroyed E-L's contract benefits, except as noted, the Trustees urged that consideration had failed and that the agreement is null and void. They proposed, however, to continue making payments to employees adversely affected by the Binghamton and Hammond transfers.

The labor interests, on oral argument, reaffirmed their previously stated position.

One preliminary matter warrants our attention. CRU filed a motion to strike the Trustees' response on the ground that it constitutes a reply to a reply in violation of Rule 23(a) of the Commission's General Rules of Practice. The Trustees argue that they are entitled to reply because the labor pleadings are nothing more than an affirmative attack on the Commission's jurisdiction and a request for deferral of Commission action. In view of our conclusions herein as to jurisdiction and as to the disposition of the Trustees' petition, CRU's motion will be denied.

DISCUSSION AND CONCLUSIONS

The threshold question to be answered before reaching the issue raised here is whether this Commission has the jurisdiction to reopen proceedings to reconsider any aspect of an order issued under section 5(2) to reflect changed circumstances. It is not necessary to rely, as the Trustees would have us do, upon sections 16(6) and 5(11) of the Act, to find a jurisdictional base for action here. The main thrust of those sections is in another direction, though they may not be considered wholly inapplicable. There seems to be little doubt, however, that adequate authority is provided by section 5(9) of the Act:

> *Supplemental Orders by the Commission*
>
> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (1), (2), or (7) as it may deem appropriate . . .

The authority to issue supplemental orders and to suspend or modify orders under section 5(9) with respect to any action this Commission may take under section 5(2) necessarily grants the continuing jurisdiction to reopen proceedings due to changed circumstances, matters related to the

overall public interest, or any other reason we deem appropriate. Any other conclusion would render section 5(9) a nullity and lock the regulatory process into the status quo, prohibiting the Commission from reacting to new developments and thereby frustrating the National Transportation Policy. Compare *American Trucking v. A. T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967).

This issue was considered at length in *Nueces County Navigation District No. 1 Construction*, 330 I.C.C. 717 (1967), where the Commission reasoned as follows:

> . . . Not only does the Commission have jurisdiction under its continuing regulatory power to reopen a proceeding for further consideration, but also under the authority granted in Section 5(9) of the Act to "make such orders, supplemental to any order made under paragraphs (1), (2), or (7) of Section 5 as it may deem necessary or appropriate". Both of the proceedings here considered involved matters falling under the provisions of Section 5(2) and good cause therefor having been shown by applicants, the Commission is authorized to take appropriate action (such as the reopening procedure following herein) to enable it to determine whether the order of November 16, 1960, should be modified or supplemented in any respect . . .
>
> . . . Under Section 5(9) it is contemplated that the Commission might from time to time reexamine a consummated section 5(2) transaction and for good cause shown, modify the terms of its approval order. This possibility of reexamination and modification, as well as the statutory provision establishing it, is an integral part of the Commission's approval of a transaction, no less so than would be the case if specific provision

> therefor was made in the approval order. Consequently, we hold that we have jurisdiction to determine whether particular plans of operation would render the transaction inconsistent with the public interest. If specific plans of operations advanced by either side are brought before us, we can and should rule on them; and if either or both are consistent with the public interest, we must so find . . .

See also *Maintenance Employees v. U. S.*, 366 U.S. 169, 172 note 2 (1961), and *Baltimore & Ohio Railroad Co. v. United States*, 386 U.S. 372, 387 (1967). We adhere to the view expressed above, and believe that the statute not only grants us the authority but also imposes upon us the obligation to be continuously aware of changing situations.

In arguing that the Commission lacks jurisdiction to suspend provisions of an employee protective agreement imposed pursuant to section 5(2)(f) of the Act, RLEA asserts that the agreement was negotiated by the parties in accordance with the procedures of the Railway Labor Act. This contention, which ignores the fact that the Commission's orders in *Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Railroad Co.—Merger, Etc.*, 330 I.C.C. 780, 822-826 (1967), required the parties "to submit evidence of agreement with respect to attrition protection . . .," is of no consequence.

Furthermore, RLEA's assertion that the agreement and the wages, rules, and working conditions governed by the Railway Labor Act may not be changed except in accordance with the procedures prescribed by that Act is squarely refuted by the language of section 5(11) of the Interstate Commerce Act which confers exclusive and plenary jurisdiction upon this Commission to approve mergers and relieves carriers from all other restraints of federal law.

The Railway Labor Act is a Federal Act and is thereby preempted by section 5(11). Thus the Commission may relieve the railroad from the requirements of that Act insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2). As the Circuit Court reasoned in *Chicago & North Western Railway Co. v. Brotherhood of Locomotive Engineers*, 202 F. Supp. 277 (S.D. Ia. 1962), *aff'd sub nom., Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co.*, 314 F. 2d 424 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963), in concluding that Congress intended for the Commission to have this power (id. at 431-432):

> to hold otherwise would be to disregard the plain language of § 5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law.
>
> Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5(11).

We find nothing in the Railway Labor Act contrary to this conclusion. We also reject RLEA's further contention that the Commission may not unilaterally reduce the benefits afforded an employee under a protective agreement negotiated pursuant to provisions of the Railway Labor Act and imposed by this Commission in the exercise of its duties under section 5(2)(f) of the Interstate Commerce Act. As support for this contention, RLEA cites *Nemitz, supra*. Their reading of *Nemitz*, in our view, is incorrect. It is true that the Supreme Court, citing the Court of Appeals, stated:

> "An Agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially, abrogate employees' rights grounded in an I.C.C. order".

That language, however, in no way affects the ability of this Commission to reduce the benefits agreed upon by the parties if the Commission finds that the negotiated benefits are potentially detrimental to the public interest. See *e.g., Florida East Coast Ry. Co. Reorganization,* 307 I.C.C. 5, 20-21 (1958), *aff'd.* 312 I.C.C. 744, 746-47 (1959), *aff'd. sub nom, In Re Florida East Coast Railway Co.,* 171 F. Supp. 512, 518-519 (S.D.Fla. 1959).

In reaching this conclusion, it should be remembered that the imposition of a particular set of labor protective conditions is a matter within the Commission's discretion. See *I.C.C. v. Railway Labor Executives Assn.,* 315 U.S. 373, 380 (1942); *City of New York v. United States,* 344 F. Supp. 929, 941 (S.D.N.Y. 1972). If the Commission were prevented from substituting a different set of conditions for those decided upon by the parties, even though its evaluation of the public interest revealed the necessity for such a step, its discretion in these matters would be seriously infringed upon.

Finally, there is no right to "attrition" conditions or a prohibition against job changes. The purpose of section 5(2)(f) was not to freeze jobs but to provide compensatory benefits. *Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 175-176 (1961). So long as the substituted or modified conditions would satisfy that purpose, the Commission would be properly carrying out its statutory functions.

In maintaining that the payments should be suspended the Trustees assert:

> The Protection Agreement was entered into pursuant to the Commission's inclusion order herein, and was founded upon the premise that the employees of Erie-Lackawanna Railroad Company would be adversely affected as the result of the vesting of ownership and control of the Erie-Lackawanna Railway Company in the Norfolk and Western Railway Company System. Hence, the payments provided for in the Protection Agreement and related agreements are based upon the implied condition of the establishment and continuation of such control and ownership . . .

In our view, this is not so. The payments are based upon an employee being deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto resulting from facility coordinations or other operational changes pursuant to the inclusion of the E-L in the N&W system. With respect to any persons so adversely affected, their right to receive benefits vested when they were affected and has nothing to do with the alleged "implied condition" or with the filing of the bankruptcy petition.[2] The employees herein have already been adversely affected and will continue to be adversely affected during and after reorganization—not as a result of

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2. Should a party be adversely affected by the occurrence of an event anticipated by the existing protective agreement after entry into bankruptcy, it would show that the bankruptcy proceedings did not end the relationship of the E-L and the N&W. Moreover, it should be noted that the Trustees never question the ultimate disposition of the E-L following reorganization but only argue that during the period of reorganization that the payments should be suspended. This argument is based on the claim that the Commission's orders under section 5 are, in effect suspended while the E-L is in reorganization because of an alleged failure of consideration. However, this position seemingly assumes that following reorganization, the Commission's orders will be revitalized as the E-L would once again attempt to effectuate the approved transaction and that only then would the adverse impact of the transaction on the employees be realized.

the reorganization but as a result of the section 5 transactions.

Nor does section 77(n) of the Bankruptcy Act support the Trustees. Rather, it refutes the Trustees' contention when it states in unequivocal terms that: "[n]o judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act . . .'. In other words, the Trustees must accept the continuing vitality of the Commission's labor conditions after entry into bankruptcy, and must likewise accept the continuing jurisdiction of the Commission to modify those orders for good cause shown. The matter would thus boil down to a question of fact with the burden being on the Trustees to demonstrate the need to have the Commission act.

Finally, we must reject the Trustees' argument based on the theory that the protective agreement is void for failure of consideration. If section 5(2)(f) labor conditions are per se rendered inapplicable while the E-L is in bankruptcy because of an alleged failure of consideration, then it would appear that all of the Commission's orders issued under section 5 concerning the E-L inclusion into the N&W system would likewise be nullified—at least for the duration of the bankruptcy proceeding—despite the fact that certain aspects of the inclusion were long ago consummated. The chaos and uncertainty that would result from this theory compel us to reject this aspect of the Trustees' argument without further comment.

In conclusion, the Commission pursuant to section 5(9) of the Act may find that the public interest requires a total or partial suspension or modification of the protective conditions it earlier imposed. In making these findings, the Commission must act within the limitations imposed by section 5(2)(f), especially if four years have not

passed since the effective date of its orders requiring the inclusion of the E-L in the N&W system. Furthermore, since a decision of the Commission would have obvious repercussions in labor relations, the Commission must be aware of these repercussions and consider alternative forms of relief so as to avoid encroaching on the jurisdiction of agencies specifically charged with responsibilities in labor matters. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 170, 173-74 (1962).

The imposition of labor conditions in proceedings under section 5(2) of the Act are mandated pursuant to the provisions of section 5(2)(f). Having once approved a transaction and imposed the required labor conditions upon a finding of consistency with the public interest, and the transaction is consummated on that basis, the parties must be bound by their acts unless a showing of substantial error has been made. The Trustees' arguments are made based on changed circumstances not resulting from the findings we made at the time of approving the transaction under section 5(2), but as a result of extraneous circumstances. Therefore, a substitution of new conditions, suspension of conditions, or elimination of conditions at this time would be contrary to the clear mandate in section 5(2)(f) unless a showing of substantial detriment to the public interest is shown.[3]

The record in this proceeding fails to provide a basis upon which the Trustees' petition may be granted.

An appropriate order will be entered.

Commissioner Murphy did not participate.

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3. It should be recalled that in approving the imposition of attrition protection herein, the Commission noted in its prior report that "it is clear that the imposition of so-called attrition conditions will not impose a significant burden on any of the carriers involved." *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 330 I.C.C. at 824.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of April, 1974.

Finance Docket No. 21510

NORFOLK AND WESTERN RAILWAY COMPANY AND NEW YORK, CHICAGO, & ST. LOUIS RAILROAD COMPANY—MERGER, ETC.

Further consideration of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed its report on further consideration, which report and prior reports in this proceeding 324 I.C.C. 1 and 330 I.C.C. 780, as modified by the report in 331 I.C.C. 22, and the order of March 14, 1968, are made a part hereof:

It is ordered, That the motion of Congress of Railway Unions to strike "response" of Trustees of Erie-Lackawanna Railway Company, be, and it is hereby, denied;

It is further ordered, That, the petition of the Trustees of the Erie-Lackawanna Railway Company, filed March 20, 1973, be, and it is hereby, denied; and

By the Commission.

Robert L. Oswald
Secretary

(SEAL)

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

STATUTES

Bankruptcy Act—§ 77 (a)

11 U.S.C. § 205 (a)

(Pertinent text only)

§ 205. Reorganization of railroads engaged in interstate commerce—Petition for reorganization by railroad, subsidiary or creditors; venue; proceedings thereon; jurisdiction of court over debtor and property

(a) * * * Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

* * * * *

Bankruptcy Act —§ 77 (n)

11 U.S.C. § 205 (n)

Claims of Employees for personal injuries and claims of sureties as preferred claims; change in wages or working conditions regulated; moving shops, etc., regulated

(n) In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in sections 151 to 163 of Title 45, as amended June 21, 1934, or as they may be hereafter amended. No reorganization effected under this title and no order of the court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title.

Railway Labor Act—§ 6

45 U.S.C. § 156

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Interstate Commerce Act—§ 5 (2)(f)

49 U.S.C. § 5(2)(f)

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement

to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Interstate Commerce Act—§ 5 (11)

49 U.S.C. § 5 (11)

Plenary nature of authority under section

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular

meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.